

## **Summary of Meeting Comments Related to OSC's Proposed Rulemaking on Contractor Disclosures**

*OSC held a stakeholder meeting on March 3, 2015, from 2:00 to 3:30 pm with representatives from six non-profits with a demonstrated interest in whistleblower issues and government transparency: Public Employees for Environmental Responsibility, Government Accountability Project, National Whistleblowers Center, Project On Government Oversight, Public Citizen, and OpenTheGovernment.org. OSC had invited eleven organizations. The meeting covered a wide variety of topics. During the course of the meeting, some representatives raised questions regarding OSC's proposed rule.*

Keith Wrightson from Public Citizen asked about the scope of coverage under OSC's proposed rule, specifically whether it would cover intelligence community contractors.

OSC Principal Deputy Special Counsel Mark Cohen fielded the question and reiterated points made in OSC's notice of proposed rulemaking, namely:

"Under the proposed rule, OSC may receive disclosures from current and former contractors who allege retaliation for making a protected disclosure under 41 U.S.C. 4712, if they work or worked on behalf of a U.S. government agency in which Federal employees are themselves eligible to file disclosures. The proposed rule will therefore limit OSC's review of disclosures by Federal contractors to those who are both covered by the NDAA and working at agencies over which OSC already has jurisdiction pursuant to 5 U.S.C. 1213."

"As with disclosures made by Federal employees pursuant to 5 U.S.C. 1213, any disclosure made by a contractor that involves foreign intelligence or counterintelligence information that is specifically prohibited by law or by Executive Order will be transmitted to the National Security Advisor, the Permanent Select Committee on Intelligence of the House of Representatives, and the Select Committee on Intelligence of the U.S. Senate. 5 U.S.C. 1213(j). The transmission will terminate OSC's involvement with the disclosure."

Cohen emphasized that the disclosure must involve government rather than private contractor wrongdoing.

Tom Devine with the Government Accountability Project asked if a contractor employee needs to be located in a government facility to be eligible to disclose to OSC or if they could be located in a contractor facility.

Cohen stated that the location of the contractor employee does not affect eligibility to file. However, Cohen noted that a contractor employee working inside a government environment is similarly situated to federal employee, and therefore is more likely to have credible, reliable information about government wrongdoing.

Later in the meeting, Wrightson asked if any issues have been identified with the proposed rule.

Cohen noted that a concern had been raised about how a disclosure made to OSC could impact False Claims Act (FCA) standing. He indicated that OSC was aware that in some circuits, filing a disclosure to

OSC before filing an FCA claim could result in waiver of the FCA claim. Therefore, OSC would consider providing a caution on the filing form to warn of this potential impact.

In addition, Cohen stated that thoughtful concern had been raised about whether contractor disclosures must meet a “substantial likelihood” standard, as under 5 USC 1213(c), given that the proposed rule falls under 5 USC 1213(g), which provides for discretionary referrals by the Special Counsel. While the standard for making a discretionary referral is lower, Cohen noted that such referrals impose fewer requirements on agencies.

Wrightson also asked if the Office of Information and Regulatory Affairs within the Office of Management and Budget would be reviewing OSC’s proposed rule. Nick Schwellenbach with OSC said they would not because the rule is not “economically significant,” most commonly defined as having at least a \$100 million impact on the economy.